

STANDARD MERGER AND ACQUISITION REVIEWS
THROUGH EQUAL RULES ACT OF 2014

DECEMBER 11, 2014.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 5402]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5402) to amend the Clayton Act and the Federal Trade Commission Act to provide that the Federal Trade Commission shall exercise authority with respect to mergers only under the Clayton Act and only in the same procedural manner as the Attorney General exercises such authority, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

	Page
Purpose and Summary	2
Background and Need for the Legislation	2
Hearings	5
Committee Consideration	5
Committee Votes	6
Committee Oversight Findings	6
New Budget Authority and Tax Expenditures	6
Congressional Budget Office Cost Estimate	6
Duplication of Federal Programs	7
Disclosure of Directed Rule Makings	8
Performance Goals and Objectives	8
Advisory on Earmarks	8
Section-by-Section Analysis	8
Changes in Existing Law Made by the Bill, as Reported	10
Dissenting Views	17

Purpose and Summary

H.R. 5402, the “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014,” or the “SMARTER Act,” harmonizes the standards applied to the Department of Justice (DOJ) and the Federal Trade Commission (FTC) when each agency seeks a preliminary injunction to a proposed merger or acquisition. Additionally, the SMARTER Act amends the Clayton Act to provide the FTC with the same authority DOJ already possesses to seek an injunction against a proposed merger, and, in doing so, removes the ability of the FTC to pursue internal administrative litigation following a court’s denial of an FTC preliminary injunction request. The SMARTER Act would preserve each agency’s authority to challenge monopolistic transactions or ones that would substantially lessen competition.

Background and Need for the Legislation

A. BRIEF OVERVIEW OF ANTITRUST ENFORCEMENT BY DOJ AND THE FTC OF PROPOSED MERGERS AND ACQUISITIONS

Two Federal agencies, the Antitrust Division of DOJ and the FTC, share responsibility for government enforcement of the Federal antitrust laws.¹ The position of Assistant Attorney General for Antitrust was created at DOJ in 1903, and the Antitrust Division became a separate operating unit within DOJ 30 years later.² In 1914, Congress passed the Federal Trade Commission Act (the FTC Act),³ which created the FTC and conferred to the independent agency antitrust enforcement authority that would, in part, supplement DOJ’s antitrust enforcement authority.

Section 7 of the Clayton Act (Section 7) prohibits mergers and acquisitions that would “substantially lessen competition” or “tend to create a monopoly.”⁴ The Antitrust Division and the FTC have essentially identical authority to enforce Section 7. The manner in which they review proposed transactions and enforce their Section 7 authority largely is prescribed by the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act).⁵ Under the HSR Act, each of the antitrust enforcement agencies is notified in advance of a proposed transaction and afforded a period of time to review the effects of such a transaction.⁶ Only one agency takes responsibility for the review of a proposed transaction.⁷ For the vast majority of transactions, the antitrust enforcement agencies will grant an early termination of the statutory waiting period or simply allow the wait-

¹ ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, at 129 (Apr. 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [hereinafter, the “AMC Report”].

² *Id.*

³ 15 U.S.C. §§ 41–58 (1914).

⁴ 15 U.S.C. § 18 (2013).

⁵ 15 U.S.C. § 18a (2013), as amended.

⁶ As a practical matter, virtually every transaction includes a period of time between the execution of the initial transaction documents that outline the intent of parties to enter into a deal and the manner in which they intend to consummate the deal, and the “closing” of the transaction when the deal is consummated. Depending on the size and complexity of the transaction, that period of time could be anywhere between a matter of weeks to over a year.

⁷ AMC Report, at 132 (2007) (explaining that there is not a governing document or policy that determines which agency reviews each proposed transaction; however, there are some historical practices that can influence which agency reviews the transaction. For example, DOJ typically reviews telecommunications transactions and the FTC typically reviews health care transactions. These historical practices, however, are not hard and fast rules and are not always followed.).

ing period to expire without taking any formal action, both of which have the effect of allowing the transaction to proceed to consummation.

When the antitrust enforcement agencies conclude that the consummation of a proposed transaction would violate Section 7, the agencies pursue an injunction of the transaction in Federal court. Generally speaking, if the court grants the injunction, the parties abandon the merger; if the court denies the injunction, the parties consummate the transaction shortly thereafter.

B. DISPARATE PRELIMINARY INJUNCTION STANDARDS

The FTC and DOJ confront different standards when seeking a preliminary injunction of a proposed transaction in court. When reviewing the FTC's request for a preliminary injunction, courts apply the standard explicitly set forth in Section 13(b) of the FTC Act, which states that "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond."⁸ By comparison, Section 15 of the Clayton Act, pursuant to which DOJ seeks injunctions, does not specify a standard of review for courts when they determine whether to grant preliminary injunctive relief. Consequently, DOJ must meet the traditional preliminary injunction standard as applied by the presiding Circuit Court, which generally requires "a reasonable likelihood of success on the merits" and "the balance of equities" favoring DOJ.⁹

These disparate preliminary injunction standards can yield different results. Some commentators go so far as to suggest that the FTC may even be subject to a more lenient standard than DOJ.¹⁰

C. DISPARATE PROCESSES TO PREVENT A PROPOSED TRANSACTION

Generally, DOJ agrees with the transaction parties to combine the proceedings for both a preliminary injunction and permanent injunction before the district court.¹¹ In contrast, the FTC's practice is to seek only a preliminary injunction, despite the fact that they have the authority to consolidate the proceedings in the same fashion as DOJ. In fact, the FTC has affirmatively fought against efforts to consolidate the preliminary injunction and permanent injunction proceedings.¹²

One of the primary reasons that the FTC's practice to pursue only a preliminary injunction is it preserves the FTC's ability to pursue administrative litigation following the denial of a prelimi-

⁸ 15 U.S.C. § 53(b) (2013).

⁹ See, e.g., *United States v. Siemens Corp.*, 621 F.2d 499, 505–06 (2d Cir. 1980) (citations omitted). Although courts generally also require a showing of irreparable injury or substantial harm to the public to grant a preliminary injunction, many courts have held that irreparable harm to the public should be presumed once the government establishes a reasonable probability of success. See, e.g., *id.* at 506. See also the American Bar Association, Section of Antitrust Law, Public Comments Submitted to the Antitrust Modernization Commission Regarding Differential Merger Enforcement Standards, at 3 (Oct. 28, 2005).

¹⁰ AMC Report, at 142 (2007). But see AMC Report at 142 n.90 statement of William Blumenthal (stating that the perception continually changes, and that it is not invariably the case that people would rather be before the DOJ).

¹¹ AMC Report, at 138 (2007).

¹² See Pl. FTC's Mem. in Opp'n to Defs.' Mot. Seeking Consolidation of Prelim. & Permanent Injs., *FTC v. Arch Coal, Inc.*, Case No. 1:04–CV–00534, at 3, 4 (Apr. 22, 2004) (arguing against consolidation).

nary injunction request. The FTC may pursue an administrative hearing after the denial of a preliminary injunction if, on a case-by-case basis, it determines that administrative litigation would serve the public interest.¹³ In contrast, the DOJ does not have the authority to conduct administrative litigation.

D. THE ANTITRUST MODERNIZATION COMMISSION AND ITS RECOMMENDATIONS

In early 2003, the bi-partisan Antitrust Modernization Commission (the AMC) was formed pursuant to the Antitrust Modernization Act.¹⁴ The AMC was charged with examining the antitrust laws, soliciting the opinions of experts on the operation of such laws, and publishing a report with the AMC's recommendations for any improvements to the antitrust laws. On April 2, 2007, the AMC issued a 540-page report that detailed the issues it examined and provided a number of recommendations for legislative, administrative, and judicial action.

Included in the AMC report was an examination of the issues attendant to the existing disparities in the preliminary injunction standards applied to DOJ and the FTC, and the disparate processes available to DOJ and the FTC when each agency seeks to prevent a proposed transaction. As stated within the AMC report:

Parties to a proposed merger should receive comparable treatment and face similar burdens regardless of whether the FTC or the DOJ reviews their merger. A divergence undermines the public's trust that the antitrust agencies will review transactions efficiently and fairly. More important, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction.¹⁵

The AMC report further explains that even the perception of a difference between the standards applied to, and processes used by, the agencies could impact how parties interact with the agencies. For example, the FTC may be perceived as having greater leverage when negotiating a consensual consent decree with the proposed transaction parties.¹⁶ Again, "just the perception that the applicable rules depend on the happenstance of which agency is reviewing the transaction can undermine confidence in the fairness of a dual merger enforcement regime."¹⁷

E. THE SMARTER ACT

The SMARTER Act incorporates a number of the recommendations made by the AMC, and provides the antitrust enforcement agencies with consistent authority and processes when seeking to prevent a proposed transaction. Specifically, the SMARTER Act confers to the FTC the same authority that DOJ presently pos-

¹³ Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741 (1995).

¹⁴ Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857.

¹⁵ AMC Report, at 138-9 (2007). The importance of removing any potential divergence is underscored by the fact that it often is mere chance or, the "flip of a coin," that determines which agency reviews the proposed transaction.

¹⁶ AMC Report, at 142 (2007).

¹⁷ *Id.*

sesses under the Clayton Act. In doing so, the SMARTER Act also requires the FTC to petition the district court to seek an injunction of a proposed transaction rather than using an internal administrative process. The FTC will retain administrative litigation capabilities in other contexts. As the AMC report highlights:

Elimination of administrative litigation in HSR Act merger cases will not deprive the FTC of an important enforcement option. Although administrative litigation may provide a valuable avenue to develop antitrust law in general, it appears unlikely to add significant value beyond that developed in Federal court proceedings for injunctive relief in HSR Act merger cases. Whatever the value, it is significantly outweighed by the costs it imposes on merging parties in uncertainty and litigation costs.¹⁸

Accordingly, under the SMARTER Act, both DOJ and the FTC remain able to pursue both preliminary and permanent injunctions, and the standards applied by courts to both agencies will be identical. Consequently, while there will continue to be a dual antitrust enforcement regime, the standards and processes applied to parties who undergo a transaction review will be harmonized.

Hearings

On April 3, 2014, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law conducted a hearing on a discussion draft of the SMARTER Act. The witnesses at the hearing were: Deborah Garza, Esq., Partner, Covington & Burling LLP, former Chairwoman of the Antitrust Modernization Commission, former Acting Assistant Attorney General of the Department of Justice; Richard Parker, Esq., Partner, O'Melveny & Myers LLP, former Director of the Bureau of Competition of the Federal Trade Commission; Abbott (Tad) B. Lipsky, Jr., Esq., Partner, Latham & Watkins LLP, former Deputy Assistant to the Assistant Attorney General of the Department of Justice; and Professor John B. Kirkwood, Seattle University School of Law.

All four witnesses, including the Minority witness, testified in support of the same preliminary injunction standard being applied to both antitrust enforcement agencies. Additionally, three of the four witnesses testified in support of removing the FTC's ability to pursue administrative litigation solely in the context of merger reviews. These witnesses testified that such a change would promote transparency, fairness, and predictability to the merger review process as well as allow the United States to continue its leadership role in global antitrust enforcement policy.

Committee Consideration

On September 10, 2014, the Committee met in open session and ordered the bill, H.R. 5402, favorably reported without amendment, by voice vote, a quorum being present.

¹⁸ AMC Report, at 141 (2007) (citations omitted).

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 5402.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 5402, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 6, 2014.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5402, the "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie, who can be reached at 226-2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 5402—Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014.

As ordered reported by the House Committee on the Judiciary
on September 10, 2014.

CBO estimates that implementing H.R. 5402 would not significantly affect discretionary spending. Enacting H.R. 5402 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

Under current law, both the Federal Trade Commission (FTC) and the Department of Justice (DOJ) enforce Federal antitrust laws, though in some instances, the manner in which that authority is exercised is different in the two agencies. H.R. 5402 would amend the Clayton Act and the Federal Trade Commission Act to align certain procedures followed by the FTC to review a proposed merger or acquisition with those followed by DOJ.

Specifically, the bill would:

- Harmonize the standard each agency must meet before a Federal court can issue a preliminary injunction against a proposed transaction;
- Direct the FTC to resolve a contested merger or acquisition through a Federal court rather than through administrative litigation; and
- In cases where the FTC and the parties reach an agreement that allows the merger or acquisition to proceed, require the agency to submit the agreement to the Federal court for its approval.

CBO expects that the FTC's efforts to prepare for and litigate a contested merger in Federal court using the new standard specified in H.R. 5402 would not require a significant increase in staffing levels. Over the past 5 years, the FTC has filed 6 preliminary injunctions in Federal court. Based on information from the agency, CBO expects that volume to remain relatively constant over the next 5 years.

Similarly, the FTC approved, on average, fewer than 15 agreements related to proposed mergers over each of the past 5 years. Under H.R. 5402, those agreements would be considered by the Federal courts rather than the FTC under similar, though not identical, procedures. Taking into account the small number of agreements sought each year and the fact that the FTC follows procedures similar to those required in H.R. 5402, we estimate the increased workloads resulting from the new requirement would have an insignificant effect on the FTC's staffing levels and on the workload of the Federal courts.

H.R. 5402 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 5402 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from GAO to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 5402 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5402 amends the Clayton Act and the Federal Trade Commission Act to provide the Federal Trade Commission with the same authority as the Department of Justice with respect to mergers under the Clayton Act.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5402 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f) or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title.

Sets forth the short title of the legislation as the “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014.”

Section 2. Amendments to the Clayton Act.

Subsection 2(1) amends Section 4F of the Clayton Act, which provides that the Attorney General must notify state attorneys general of any antitrust action in which he or she believes the state could bring an action based on substantially similar facts, and share related files with such state attorneys general. The SMARTER Act amends this section to subject the FTC to these same requirements.

Subsection 2(2)(A) amends section 5(a) of the Clayton Act, which provides that, in cases brought by the United States that result in final judgments against a defendant, those judgments can be used as *prima facie* evidence (*i.e.*, unless rebutted, sufficient to prove the allegation) of antitrust violations under substantially similar facts brought by other parties. The SMARTER Act amends this section to clarify that actions brought by the United States include actions brought by the FTC under Section 7.

Subsection 2(2)(B) amends section 5(b) of the Clayton Act, which provides that the United States, in civil actions to which the United States is a party, must publish proposed consent orders, and comments to such orders, in the Federal Register along with “competitive impact statements” that generally describe the nature of the actions, the violations and the proposed consent judgments. The SMARTER Act amends this section to clarify that the FTC is also subject to these same requirements for cases brought under Section 7.

Subsection 2(2)(C) amends section 5(c) of the Clayton Act, which provides that the United States must publish in newspapers in

general circulation in the district in which a case is filed, in the District of Columbia, and in other districts that the presiding court may direct, a summary of the proposed consent judgment, the related competitive impact statement, and a list of materials that the United States will make available for public inspection. The SMARTER Act amends this section to clarify that the FTC is also subject to these same requirements for cases brought under Section 7.

Subsection 2(2)(D) amends section 5(d) of the Clayton Act, which provides that the Attorney General must consider comments submitted by the public to a consent judgment and file a response to such comments in the Federal Register (or in another manner as the presiding court may prescribe). The SMARTER Act amends this section to clarify that the FTC is also subject to these same requirements for cases brought under Section 7 of the Clayton Act.

Subsection 2(2)(E) amends section 5(e) of the Clayton Act, which provides certain factors that a court must consider when approving a proposed consent judgment submitted by the United States. The SMARTER Act amends this section to clarify that the term United States includes the FTC.

Subsection (2)(2)(F) amends section 5(f) of the Clayton Act, which provides a reviewing court certain tools when considering a proposed consent judgment, including allowing it to review the comments submitted to the United States as part of the required publication process. The SMARTER Act amends this section to clarify that the term United States includes the FTC.

Subsection (2)(2)(G) amends section 5(g) of the Clayton Act, which requires a defendant in the action to submit a description of any communication it, or its agents, had with the Attorney General or DOJ employees relevant to a consent judgment, excluding communications by the defendant's counsel of record. The SMARTER Act amends this section to provide that the same requirement is applicable to communications with the FTC or its employees.

Subsection (2)(2)(H) amends section 5(i) of the Clayton Act, which suspends the statute of limitations for private and state rights of action based on the conduct in question during a United States' proceeding and for 1 year thereafter, except that claims brought under section 4 or 4C of the Clayton Act only may be brought during the United States' proceeding or within 4 years after the cause of action accrued. The SMARTER Act amends this section to clarify that the statute of limitations is also tolled for actions brought by the FTC under Section 7.

Subsection 2(3) amends section 11 of the Clayton Act, which authorizes the enforcement of compliance with certain sections of the Clayton Act by Federal agencies with specific expertise and provides for procedures for such enforcement. For example, section 11 authorizes the Federal Reserve Board to enforce compliance of these sections of the Clayton Act against banks, banking associations, and trust companies. The SMARTER Act excludes the FTC's enforcement of Section 7 from these separate procedures, which further ensures that the FTC's Section 7 enforcement procedures will be identical to the procedures applicable to the Attorney General.

Subsection 2(4) amends section 13 of the Clayton Act, which allows the United States to issue subpoenas that will be effective in

any judicial district. The SMARTER Act amends this section to clarify that the term United States includes the FTC when it is prosecuting Section 7 cases.

Subsection 2(5) amends section 15 of the Clayton Act, which provides that it is the duty of the United States district attorneys, under the direction of the Attorney General, to institute antitrust lawsuits and provides them with authority to seek temporary restraining orders or other remedies against the offensive conduct. The SMARTER Act amends this section to provide that the Clayton Act duties and authorities are also extended to the FTC.

Section 3. Amendments to the FTC Act.

Subsection 3(1) amends section 5 of the FTC Act, which allows the FTC to initiate an administrative proceeding to evaluate an “unfair method of competition,” which could include a proposed merger. The SMARTER Act amends this section to exclude the initiation of such a proceeding on the basis of a merger review.

Subsection 3(2) amends section 9 of the FTC Act, which provides jurisdiction to the Federal courts to issue writs of mandamus that command compliance with the FTC Act. The process for obtaining such a writ of mandamus requires the FTC to request the Attorney General to submit an application to the courts for the writ. The SMARTER Act amends this section to allow the FTC to submit independently an application to the courts for such a writ for merger review cases in which the FTC finds that the activity in question constitutes an “unfair method of competition.”

Subsection 3(3) amends section 13(b) of the FTC Act, which provides authority to the FTC to seek a preliminary injunction for a violation of the FTC Act. The SMARTER Act amends this section specifically to exclude the FTC from seeking a preliminary injunction in a case brought under Section 7 because the FTC now has this authority separately under the Clayton Act.

Section 4. Effective Date; Application of Amendments.

Subsection 4(a) provides that the effective date of the SMARTER Act will be the day that it is signed into law.

Subsection 4(b) provides that the SMARTER Act will not apply to violations of Section 7 that occurred prior to the enactment of the SMARTER Act, transactions that are in compliance with Section 7A of the Clayton Act (*i.e.*, transactions for which the parties have filed a Hart-Scott-Rodino merger review notice), and consummated mergers.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

CLAYTON ACT

* * * * *

ACTIONS BY ATTORNEY GENERAL OF THE UNITED STATES OR THE
FEDERAL TRADE COMMISSION

SEC. 4F. (a) Whenever the Attorney General of the United States (*or the Federal Trade Commission with respect to a violation of section 7*) has brought an action under the antitrust laws, and he (*or it*) has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he (*or it*) shall promptly give written notification thereof to such State attorney general.

(b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States (*or the Federal Trade Commission with respect to a violation of section 7*) shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

* * * * *

SEC. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States (*including a proceeding brought by the Federal Trade Commission with respect to a violation of section 7*) under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 5 of the Federal Trade Commission Act which could give rise to a claim for relief under the antitrust laws.

(b) Any proposal for a consent judgment submitted by the United States (*including the Federal Trade Commission with respect to a violation of section 7*) for entry in any civil proceeding brought by or on behalf of the United States (*including the Federal Trade Commission with respect to a violation of section 7*) under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States (*including the Federal Trade Commission with respect to a violation of section 7*) in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States (*including the Federal Trade Commission with respect to a violation of section 7*) thereto, shall also be filed with such district court and published by the United States (*including the Federal Trade Commission with respect to a violation of section 7*) in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States (*including the Fed-*

eral Trade Commission with respect to a violation of section 7) considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States (*including the Federal Trade Commission with respect to a violation of section 7*) shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) * * *

* * * * *

(6) a description and evaluation of alternatives to such proposal actually considered by the United States (*including the Federal Trade Commission with respect to a violation of section 7*).

(c) the United States (*including the Federal Trade Commission with respect to a violation of section 7*) shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) * * *

* * * * *

(iii) and a list of the materials and documents under subsection (b) which the United States (*including the Federal Trade Commission with respect to a violation of section 7*) shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) during the 60-day period as specified in subsection (b) of this section, and such additional time as the United States (*including the Federal Trade Commission with respect to a violation of section 7*) may request and the court may grant, the United States (*including the Federal Trade Commission with respect to a violation of section 7*) shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). the Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States (*including the Federal Trade Commission with respect to a violation of section 7*) shall file with the district court and cause to be published in the Federal Register a response to such comments. Upon application by the United States (*including the Federal Trade Commission with respect to a violation of section 7*), the district court may, for good cause (based on a finding that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public

dissemination of the public comments received and the response to those comments.

(e)(1) Before entering any consent judgment proposed by the United States (*including the Federal Trade Commission with respect to a violation of section 7*) under this section, the court shall determine that entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider—

(A) * * *

* * * * *

(f) In making its determination under subsection (e), the court may—

(1) * * *

* * * * *

(4) review any comments including any objections filed with the United States (*including the Federal Trade Commission with respect to a violation of section 7*) under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

* * * * *

(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States (*including the Federal Trade Commission with respect to a violation of section 7*) concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General (*or the Federal Trade Commission*) or the employees of the Department of Justice (*or any officer or employee of the Federal Trade Commission*) alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

* * * * *

(i) Whenever any civil or criminal proceeding is instituted by the United States (*including the Federal Trade Commission with respect to a violation of section 7*) to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 or 4C is suspended hereunder, any action to enforce such cause of action shall be forever barred unless com-

menced either within the period of suspension or within four years after the cause of action accrued.

* * * * *

SEC. 11. (a) That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49, United States Code; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce (*excluding enforcing compliance with section 7*) to be exercised as follows:

* * * * *

SEC. 13. That in any suit, action, or proceeding brought by or on behalf of the United States (*including the Federal Trade Commission with respect to a violation of section 7*) subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: *Provided*, That in civil cases no writ of supoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

* * * * *

SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, *and the duty of the Federal Trade Commission with respect to a violation of section 7*, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

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FEDERAL TRADE COMMISSION ACT

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SEC. 5. (a) * * *

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition (*excluding the consummation of a proposed merger, acquisition, joint venture, or similar transaction subject to section 7 of the Clayton Act*) or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition (*excluding the consummation of a proposed merger, acquisition, joint venture, or similar transaction subject to section 7 of the Clayton Act*) or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition (*excluding the consummation of a proposed merger, acquisition, joint venture, or similar transaction subject to section 7 of the Clayton Act*) or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in

subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

* * * * *

SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

Upon the application of the commission with respect to any activity related to the consummation of a proposed merger, acquisition, joint venture, or similar transaction subject to section 7 of the Clayton Act that may result in any unfair method of competition, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be

taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

* * * * *

SEC. 13. (a) * * *

(b) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission (*excluding section 7 of the Clayton Act and section 5(a)(1) with respect to the consummation of a proposed merger, acquisition, joint venture, or similar transaction subject to section 7 of the Clayton Act*), and

* * * * *

Dissenting Views

Although H.R. 5402, the “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014” or “SMARTER Act,” may have some facial appeal, we are concerned that this measure would undermine the independence of the Federal Trade Commission (FTC) and contravene the agency’s unique role in developing antitrust policy. H.R. 5402 does this by eliminating the FTC’s ability to use the procedures established under the Federal Trade Commission Act¹ (FTC Act) to enforce antitrust law in merger cases, including, most importantly, its ability to use administrative adjudication. Moreover, while this proposal purports to implement recommendations of the Antitrust Modernization Commission (AMC), it goes far beyond the AMC’s recommendations in some respects by reaching the FTC’s ability to address non-merger activity. Finally, although we share the conclusion of most observers who believe that the preliminary injunction standards applicable to the FTC and to the Department of Justice (DOJ) in merger cases are the same as a practical matter, to the extent that the FTC Act standard is, in fact, more enforcement-friendly, as H.R. 5402’s proponents claim, then the bill wrongly chooses the weaker standard to be the uniform standard.

H.R. 5402 is not a modest measure. It represents a major change to the status quo by undermining the FTC’s fundamental nature as an independent administrative agency charged with enforcing antitrust laws and developing antitrust policy in a stable, long-term manner using bipartisan expertise. Reducing the FTC’s independence directly conflicts with Congress’s intent in creating this anti-

¹Federal Trade Commission Act of 1914, Pub. L. No. 63–203, 38 Stat. 717 (1914), codified at 15 U.S.C. §§ 41–58 (2014).

trust enforcement agency and policymaking body to be relatively shielded from political, and particularly Executive Branch, interference. More generally, the elimination of distinctions between the FTC and the DOJ in merger enforcement actions potentially opens the door to the elimination of the FTC itself by chipping away at the various differences that justify its separate existence.

We share the views expressed by FTC Chairwoman Edith Ramirez, who wrote to the Committee to express her “serious concerns” about the “far-reaching immediate effects” and the “potential for significant unintended consequences” of an earlier, but substantially similar, draft of the SMARTER Act.² In addition, the American Antitrust Institute, a consumer-oriented antitrust organization, expressed similar concerns about the legislation, particularly with respect to its elimination of the FTC’s ability to use administrative adjudication in merger cases.³

For these reasons, and those described below, we urge our colleagues to oppose H.R. 5402.

DESCRIPTION AND BACKGROUND

DESCRIPTION

H.R. 5402 eliminates the ability of the Federal Trade Commission (FTC) to use the procedures of the FTC Act in merger enforcement cases and with respect to certain types of non-merger activity. In its stead, the bill requires the FTC to use the procedures available to the DOJ under the Clayton Antitrust Act in such circumstances.⁴ The following is a description of the bill’s substantive provisions.

Section 2 of H.R. 5402 makes numerous amendments to the Clayton Act in order to subject the FTC to the merger enforcement procedures of the Clayton Act. Section 2(1) amends section 4F of the Clayton Act, which currently requires the U.S. Attorney General, whenever the government has brought an action under the antitrust laws, to notify any state attorney general when he or she has reason to believe that the state would be entitled to bring an action under the Clayton Act based on substantially the same alleged violation. It also requires the U.S. Attorney General to provide assistance upon request of any state attorney general in any actual or potential cause of action by the state in these circumstances. Section 2(1) of the bill adds references to the “Federal Trade Commission” after each reference to the U.S. Attorney General of the United States.

Section 2(2) of the bill amends section 5 of the Clayton Act, which specifies the evidentiary weight of judgments and consent decrees in any criminal or civil proceeding brought by the government under the antitrust laws in any action by a third party. Sec-

²Letter from the Honorable Edith Ramirez, Chairwoman, Federal Trade Commission, to Representatives Spencer Bachus (R-AL), Chair, and Henry C. Johnson, Jr. (D-GA), Ranking Member, of the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary (Apr. 2, 2014) on file with Democratic staff of the H. Comm. on the Judiciary [hereinafter “Ramirez Letter”].

³Letter from Albert A. Foer, President, American Antitrust Institute, to Representatives Spencer Bachus (R-AL), Chair, and Henry C. Johnson, Jr. (D-GA), Ranking Member, of the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary (Apr. 9, 2014) on file with Democratic staff of the H. Comm. on the Judiciary [hereinafter “AAI Letter”].

⁴Clayton Antitrust Act of 1914, Pub. L. No. 63–212, 38 Stat. 730 (1914), codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2014).

tion 5 also specifies procedures for public notice and comment on proposed consent decrees (including the requirement that the government file a competitive impact statement), requires a court to make a public interest determination prior to entering a consent judgment, outlines procedures for making such a public interest determination, requires a defendant to file with the court written or oral communications with the government, makes inadmissible as evidence competitive impact statements or public interest determinations in any action brought against a defendant by a third party, and suspends the statute of limitations for every private or state right of action under the antitrust laws when the federal government institutes a proceeding. Section 2(2) of the bill adds references specifying that the term “United States” as used throughout this provision includes the FTC with respect to merger cases.

Section 2(3) of H.R. 5402 amends section 11(a) of the Clayton Act, which reserves enforcement authority for certain provisions of the Clayton Act for agencies other than the DOJ. Among the other agencies listed is the FTC “where applicable to all other character of commerce.” Section 2(3) of the bill would specifically exclude from this authority enforcement of section 7 of the Clayton Act, governing mergers and other acquisitions.

Section 2(4) of the bill amends section 13 of the Clayton Act, which provides that in any government suit, subpoenas for witnesses who are required to attend a federal court in any judicial district in an antitrust case may have effect in any other district when the witness lives within 100 miles of the trial court unless the trial court permits the subpoena to extend beyond the 100-mile reach. Section 2(4) of the bill would specify that reference to the “United States” in this provision includes the FTC in merger cases.

Section 2(5) of the bill amends section 15 of the Clayton Act, which grants federal district courts jurisdiction to consider violations of the Clayton Act. It also makes it the duty of the U.S. Attorney General and U.S. Attorneys to institute court proceedings to restrain violations of the Act. In addition, section 15 specifies that the court may provide injunctive relief, issue temporary restraining orders, and summon other parties through subpoena if necessary when the ends of justice require in such cases. Section 2(5) of the bill adds a reference to the FTC in the provision outlining the “duty” of the U.S. Attorney General and U.S. Attorneys.

Section 3 of the bill makes several amendments to the FTC Act that, broadly speaking, eliminate the FTC’s authority to act pursuant to the FTC Act’s provisions in merger cases and certain other circumstances. Section 3(1) amends section 5(b) of the FTC Act, which provides the FTC with the authority to institute administrative proceedings against a person, partnership, or corporation whenever the FTC determines that such a party has been or is using “any unfair method of competition,” among other things. If the FTC determines after a notice and hearing that the target of the complaint has engaged in the “unfair method of competition” and prepares a report to that effect, the FTC may issue a cease and desist order. A party may appeal an FTC decision to a federal court of appeals.

A central objection to the SMARTER Act is in section 3(1)(A) of the bill, which would exclude from the definition of “unfair method of competition” any “unfair method of competition that would result

from the consummation of a merger, acquisition, joint venture, or similar transaction.” The exclusion of a “joint venture” or “similar transaction” from the definition of “unfair method of competition” suggests that the bill’s elimination of the FTC’s administrative authority extends beyond mergers to include arguably non-merger anticompetitive conduct.

Section 3(2) of the bill amends section 9 of the FTC Act, which specifies, among other things, that the FTC may request, through the U.S. Attorney General, that a federal district court issue a writ of mandamus to any person, partnership, or corporation to comply with any of the FTC’s orders pursuant to the FTC Act. Section 3(2) of the bill allows the FTC to directly seek a writ of mandamus from a federal district court with respect to any activity in preparation for a merger, acquisition, joint venture, or similar transaction which if consummated, may result in any unfair method of competition.

Section 3(3) of the bill amends section 13(b)(1) of the FTC Act, which sets forth the FTC’s authority to bring suit in a federal district court to enjoin any conduct that violates any provision of law enforced by the FTC. Section 13(b) also articulates the standard for granting a preliminary injunction, which requires a showing that, “weighing the equities and considering the [FTC’s] likelihood of ultimate success, such action would be in the public interest.” It further provides that if the FTC does not file a complaint within a time period specified by the court not to exceed 20 days, the preliminary injunction is dissolved. Section 3(3) of the bill excludes from section 13(b) any actions that violate section 7 of the Clayton Act and section 5(a)(1) of the FTC Act (which declares, in part, that unfair methods of competition are unlawful) with respect to an unfair method of competition that would result from the consummation of a merger, acquisition, joint venture, or similar transaction. While many commentators say that, in practice, the preliminary injunctions applicable to the FTC and the DOJ are the same, to the extent that the FTC Act standard is different and “stronger” from a consumer-protection perspective, the bill’s proponents offer no reason why the FTC standard, rather than the general standard applicable to DOJ, should not be the standard applicable to both agencies in merger cases.

BACKGROUND

A. *The Federal Trade Commission*

1. *History and Reasons for Creation*

In 1890, the Sherman Antitrust Act was enacted to stop the anti-consumer abuses resulting from an unchecked wave of corporate mergers.⁵ Thereafter, the position of Assistant Attorney General for Antitrust in the DOJ was created in 1903.⁶ Neither effort, however, was sufficiently effective to stem these abuses. Thus, President Woodrow Wilson, in 1914, signed the FTC Act,⁷ which established the FTC and made unlawful, *inter alia*, “unfair methods of competi-

⁵ 15 U.S.C. §§ 1–7 (2014).

⁶ The Antitrust Division became a separate operating unit within DOJ in 1933. ANTITRUST MODERNIZATION COMMISSION, *Report and Recommendations* [hereinafter “AMC Report”], at 129 (Apr. 2007), http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

⁷ 15 U.S.C. §§ 41–58 (2014).

tion.”⁸ That same year, President Wilson also signed into law the Clayton Antitrust Act.⁹ Congress created the FTC to encourage development of antitrust policy by antitrust experts through an independent administrative agency that would share enforcement authority with the DOJ¹⁰ and have the exclusive authority to enforce the FTC Act.¹¹ Additionally, Congress gave the FTC broad investigative and reporting powers and empowered the Commission to use an administrative adjudication process to enforce the antitrust laws rather than try cases before a federal judge, though the FTC’s decisions may be appealed to a federal court of appeals.¹²

According to one historical study of the origins of the FTC, the congressional advocates for its creation were dissatisfied with what, in their view, was the failure of the Sherman Antitrust Act to stop the merger wave and corporate abuses that occurred in the 24 years from its enactment to the passage of the FTC Act in 1914.¹³ Advocates for the creation of the FTC disclaimed any intent to amend the Sherman Act or to undermine DOJ’s enforcement role, but, rather, sought to enhance existing antitrust law and enforcement.¹⁴ In particular, they “wanted a new agency that would prosecute if the [DOJ] faltered, enforcing a flexible new standard where the Sherman Act might not.”¹⁵

Congress historically has sought to give the FTC broad authority to prohibit unfair methods of competition. This is demonstrated by the fact that every time the Supreme Court has issued a decision restricting the FTC’s statutory authority, Congress has responded by amending the FTC Act to expand the FTC’s authority.¹⁶ In reaction against this ever-increasing grant of authority, however, something of a backlash against the FTC began in 1980, which one commentator described as “a tidal wave of response and restricting legislation.”¹⁷ Most recently, for example, the U.S. Chamber of Commerce has been highly critical of the FTC for its use of its authority under section 5 of the FTC Act to prohibit “unfair methods of competition.”¹⁸

⁸ 15 U.S.C. § 45(a) (2014); Marc Winerman, *A Brief History of the Federal Trade Commission: Federal Trade Commission 90th Anniversary Symposium*, 6 (Sept. 22, 2004), http://www.ftc.gov/sites/default/files/attachments/ftc-90-symposium/90thanniv_program.pdf [hereinafter *FTC History*].

⁹ *FTC History*, at 6; 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2014).

¹⁰ An “independent” agency is one that has some measure of independence from the President. The main mark of such independence is that the President cannot remove the head of such an agency without cause. Independent agencies are often styled “commissions” or “boards.” STEPHEN G. BREYER, *et al.*, *ADMINISTRATIVE LAW AND REGULATORY POLICY*, at 100 (4th ed. 1999).

¹¹ While the FTC has no authority to enforce the Sherman Act, the Supreme Court has held that any conduct that violates section 1 of the Sherman Act would also violate section 5(a) of the FTC Act. *Federal Trade Comm’n v. California Dental Ass’n*, 526 U.S. 756, 763 n.3 (1999) (“The FTC Act’s prohibition of unfair competition and deceptive acts or practices . . . overlaps the scope of § 1 of the Sherman Act.”).

¹² 15 U.S.C. § 45(b) (2014).

¹³ Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *ANTITRUST L. J.* 74 (2003), <http://www.ftc.gov/sites/default/files/attachments/federal-trade-commission-history/origins.pdf>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *FTC History*, at 7–9 (outlining instances in the 1920’s and 1930’s in which Congress expanded the FTC’s authority in response to restrictive Supreme Court decisions, and also highlighting further expansions of the FTC’s authority by Congress in the 1950’s and 1970’s).

¹⁷ *Id.* at 9.

¹⁸ U.S. CHAMBER OF COMMERCE, *Unfair Methods of Competition Under Section 5 of the FTC Act: Does the U.S. Need Rules “Above and Beyond Antitrust”?*, GCP: THE ANTITRUST CHRONICLE, (Sept. 2009), http://www.uschamber.com/sites/default/files/reports/0909antrnst_0.pdf.

2. *FTC and the Broader Antitrust Merger Enforcement Regime*

As noted, the DOJ's Antitrust Division and the FTC's Bureau of Competition enforce the Nation's antitrust laws jointly. Both agencies enforce section 7 of the Clayton Act, which prohibits anti-competitive mergers and other types of acquisitions.¹⁹ Pursuant to this responsibility, both have the authority to conduct antitrust reviews of proposed mergers and acquisitions. To facilitate coordination between them, the DOJ and FTC developed joint standards known as the "Merger Guidelines" that outline the type of inquiry to be followed in reviewing a proposed merger.²⁰ The Guidelines state, "The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."²¹

With respect to the review of a proposed merger, once parties make the requisite filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976²² (HSR), which established a pre-merger review process for transactions that meet certain dollar thresholds, it is up to the agencies to decide during that initial 30-day review period which agency will review the transaction. The agencies have developed an informal process that relies primarily upon historical experience in the relevant industry to determine which agency has a better claim to review a particular transaction.

If the reviewing agency ultimately determines that the transaction is illegal, it will file a complaint in federal court (if the enforcement agency is DOJ) or institute an administrative proceeding (if the enforcement agency is FTC) to stop the parties from consummating the transaction. Often times, such suits are resolved with the entry of a consent decree whereby the merger parties agree to take certain steps (usually the divestiture of certain assets, sometimes commitments by the merging parties to take certain other actions) to address the reviewing agency's antitrust concerns. As a practical matter, the HSR pre-merger review process has dramatically reduced the amount of antitrust litigation since its enactment.

3. *Preliminary injunctions in merger cases*

In the exceedingly rare instances where the government and the merging parties do not reach a consent agreement at the moment the government has filed suit, the government may seek a temporary restraining order and a preliminary injunction to stop consummation of the merger while the government pursues its complaint. Nominally, FTC and DOJ are subject to different standards for the grant of preliminary injunctions. While the dominant view is that in practice both standards essentially are the same, there are some who believe that the FTC standard is more favorable to the enforcement agency.

¹⁹ 15 U.S.C. § 21(a) (2014).

²⁰ U.S. DEPT OF JUSTICE AND FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010).

²¹ *Id.* at 2.

²² Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976), codified at 15 U.S.C. § 18a (2014).

B. Antitrust Modernization Commission

Congress created the Antitrust Modernization Commission (AMC) in 2002 to examine whether antitrust laws, policies, and procedures needed to be amended in light of changes to the economy, and particularly the impact of the rise of the high-technology sector and its implications for antitrust and competition policy.²³ In 2007, the AMC issued a 449-page report outlining 80 recommendations for revisions to antitrust law and policy.²⁴ Only two of these 80 recommendations—recommending the elimination of FTC’s administrative adjudication authority for merger cases and the adoption of a uniform preliminary injunction standard—are relevant to consideration of the SMARTER Act.

CONCERNS WITH H.R. 5402

- I. H.R. 5402 WOULD UNDERMINE THE FTC’S INDEPENDENCE AND CONTRAVENE CONGRESS’S PURPOSE IN CREATING THE AGENCY, ESPECIALLY BY ELIMINATING THE FTC’S ADMINISTRATIVE ADJUDICATION AUTHORITY IN MERGER CASES.

H.R. 5402 would effectuate a fundamental change to the FTC’s century-old organizational structure and lessen the agency’s independence. By eliminating its authority to pursue administrative litigation in merger cases and other circumstances, the bill would essentially undermine the FTC’s character as an independent administrative agency and turn it into another executive enforcement agency in HSR merger cases, which contravenes Congress’s purpose in establishing the FTC in the first place.

As the AMC Report recognized, Congress created the FTC as an *independent* agency—that is, one with a considerable measure of independence from the President—not only to supplement the DOJ’s enforcement activity where Congress thought DOJ enforcement may be lacking, but also to develop antitrust policy by relying on a body of antitrust experts rather than generalist courts or the DOJ, which, as an arm of the Executive Branch, may be subject to dramatic swings in political ideology.²⁵ As FTC Chairwoman Ramirez noted, “Congress created the Commission in 1914 as a bipartisan expert agency that would augment existing antitrust enforcement authority by taking a considered and long-term approach to developing antitrust law and safeguarding competition,”²⁶ recognizing that “American consumers would benefit from an expert agency with the means to develop competition law and policy over time.”²⁷ By weakening the FTC’s independence, H.R. 5402 jeopardizes these benefits for American consumers.

Beyond the specific changes proposed by H.R. 5402, we are wary of any measure to alter, and possibly diminish, the FTC’s authority. Opponents of the FTC’s enforcement activities have engaged in a longstanding campaign to undermine the agency, both because of

²³ Antitrust Modernization Commission Act of 2002, Pub. L. No. 107–273, § 11054(h), 116 Stat. 1856, 1857 (2002).

²⁴ AMC Report.

²⁵ *Id.* at 129 (noting that Congress “also believed that an administrative agency—conducting administrative adjudication of antitrust cases, and vested with broad information-gathering powers—would be a better vehicle for developing more flexible standards of antitrust law than were the courts.”).

²⁶ Ramirez Letter.

²⁷ *Id.*

its role as an antitrust enforcer and also because of its work in the consumer protection arena. Any proposal to alter the FTC's authority, and particularly one that would eliminate its distinctiveness *vis à vis* the DOJ, should be viewed with skepticism. Although H.R. 5402 is ostensibly limited to HSR merger cases, eliminating distinctions between the DOJ and the FTC is a possible way to justify ultimately eliminating the FTC altogether, at least as an antitrust enforcement and policymaking agency.

In addition, H.R. 5402 does not appear to address a particularly pressing or widespread problem. To the extent that the main concern of H.R. 5402's proponents is to reduce costs and uncertainty by promoting uniformity in merger reviews, it should be noted that FTC and DOJ already analyze mergers by following the same substantive policy in conducting pre-merger reviews, *i.e.*, the joint Merger Guidelines. The changes that H.R. 5402 contemplates would apply in the exceedingly rare instances where: (1) a transaction is large enough to merit HSR review; (2) after the review, the reviewing agency determines that it would challenge the transaction through litigation; (3) the parties do not agree to any settlement, including divestitures and other commitments; and (4) the parties choose to continue with their transaction despite the filing of a complaint by the reviewing agency rather than abandoning the transaction. Instances where the FTC would seek a preliminary injunction and use its administrative process are rare, and instances when the FTC seeks to use its administrative process after losing a preliminary injunction proceeding in court are even more rare. Additionally, the FTC's internal procedures already make it highly unusual that the agency would ever seek such a "second bite at the apple."²⁸ Nonetheless, there may be rare instances where, even in the "second bite" scenario, it is in the public interest to allow the FTC to pursue administrative litigation where developing a full administrative record would help make an advancement in the law in ways that a court would be less well-equipped to do.

It is with the foregoing in mind that we are particularly troubled by H.R. 5402's elimination of the FTC's authority to use administrative adjudication in merger enforcement matters. As Chairwoman Ramirez noted, "Congress gave the FTC unique tools to carry out [the FTC's] special charge. These include expert research authority, broad information-gathering power, and, of particular significance here, an adjudicative function in which the FTC considers and decides cases as an expert tribunal, subject to review by a federal court of appeals."²⁹ Chairwoman Ramirez further noted that this

quasi-judicial role is a defining characteristic of the FTC and is critical to our ability to fulfill our mission to promote competition and advance consumer welfare. It allows the Commission to conduct thorough hearings to develop

²⁸H.R. 5402's proponents may cite the actions of the FTC in the Whole Foods-Wild Oats merger as an example of the FTC's problematic use of administrative proceedings after losing a preliminary injunction proceeding in court. In that case, however, the U.S. Court of Appeals for the D.C. Circuit ultimately vindicated the FTC's pursuit of administrative litigation after losing the preliminary injunction proceeding in court when the appeals court reversed the district court's denial of the FTC's request for a preliminary injunction. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008). Additionally, as both the AMC and AAI have pointed out, the FTC's own internal practice and procedures make the "second bite" scenario unlikely. AMC Report at 141; AAI Letter at note 4.

²⁹Ramirez Letter.

both the facts and the law in a broad variety of antitrust matters. Our adjudicative function has been particularly valuable in complex areas such as hospital mergers, where the Commission has used the combination of its information-gathering power and case-specific law enforcement authority to develop a coordinated, well-considered approach to challenging anticompetitive conduct, one that has now been endorsed by the federal courts.³⁰

In discussing the value of administrative adjudication, the American Antitrust Institute (AAI) stated in its letter to the Committee:

[P]rudence compels caution in any tinkering with a system of dual enforcement including administrative adjudication that emerged out of robust debate in the course of the 1912 Presidential election campaign and that Congress adopted two years later in the face of grave concern over the fate of antitrust enforcement generally when left exclusively in the hands of generalist judges.

. . .

AAI believes that eliminating FTC administrative adjudication would almost surely be counterproductive. We would thereby (a) lose the considerable benefits of expert agency policy evolution, the original Wilson/Brandeis vision giving rise to the FTC's creation a hundred years ago and more important than ever for sound evolution of merger policy in the 21st Century; and (b) exacerbate any inefficiency of dual enforcement generally since we would then have two enforcement agencies applying the same merger law standards and procedures to different companies in different industries in cases brought exclusively to generalist courts. A more logical course would be channeling all merger enforcement to the FTC and its expert administrative processes.³¹

Similarly, at a hearing before the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law examining draft legislation that was substantially similar to H.R. 5402, Professor John Kirkwood of Seattle University School of Law expressed great concern about the removal of the FTC's administrative adjudication authority.³² He testified that the purpose of having this authority was to allow the FTC to develop antitrust law in a less partisan, more expert way than generalist courts and a DOJ under the control of one political party could.³³ Professor Kirkwood's concern was twofold. First, removing the FTC's administrative adjudication authority in merger cases might lead to a "slippery slope" whereby its authority with respect to other areas of antitrust enforcement could eventually be eliminated or consolidated with that of DOJ.³⁴ Second, administrative adjudication supports the FTC's congressionally-mandated mission of developing administrative expertise

³⁰ *Id.*

³¹ AAI Letter at ¶¶ 3, 5.

³² Subcommittee Hearing (written statement of John B. Kirkwood, Professor of Law and Associate Dean for Strategic Planning and Mission, Seattle University School of Law).

³³ *Id.*

³⁴ *Id.* at 5.

through sustained attention, information-gathering, and vigorous enforcement.³⁵ Professor Kirkwood acknowledged that the unique benefits of administrative adjudication were not as strong in all cases. In those instances when an industry is changing rapidly or when an agency has not developed much expertise in it, however, an administrative proceeding would be quite helpful, such as the FTC's use of administrative proceedings in hospital merger enforcement as an example of such benefits.³⁶

In agreeing with the views of Chairwoman Ramirez, Mr. Foer, and Professor Kirkwood, Ranking Member John Conyers, Jr. (D-MI) stated that H.R. 5402, "rather than strengthening the FTC's enforcement authority, does exactly the opposite."³⁷ Ranking Member Conyers further stated that "our preeminent goal should be to strengthen, not weaken, antitrust enforcement to protect consumers."³⁸

II. H.R. 5402'S SCOPE IS BROADER THAN THE AMC RECOMMENDATIONS.

To the extent that H.R. 5402's proponents claim that the bill simply applies the AMC's recommendations, we note that H.R. 5402 exceeds what the AMC contemplated in its recommendations. Specifically, the AMC recommended that Congress should eliminate the FTC's authority to pursue administrative litigation in HSR cases and that it should ensure that the same standard that DOJ is subject to when seeking a preliminary injunction in an HSR case also applies to the FTC.³⁹ First, rather than limiting its provisions to these two recommendations, the bill would make the FTC functionally equivalent to the DOJ in large merger cases, which, arguably, is a step towards eliminating the dual enforcement regime, which the AMC specifically said it was not recommending.⁴⁰ Second, the bill's carve-out for the FTC's administrative adjudication authority would reach beyond merger cases to also include a "joint venture" and "similar transaction," meaning that the loss of the FTC administrative adjudication authority would extend beyond the scope of section 7 of the Clayton Act to also include potentially non-merger activity. The bill also eliminates the independent grant of authority to the FTC under Clayton Act section 11, eliminating administrative adjudication for consummated mergers too. Third, the bill would impose certain unhelpful or currently ineffective Clayton Act obligations on the FTC merger enforcement process, such as certain public notice and comment requirements concerning proposed consent decrees and the Tunney Act requirement that a district court make a public interest determination before entering a consent judgment.⁴¹

³⁵ *Id.*

³⁶ *Id.*

³⁷ Unofficial Tr. of the Markup of H.R. 5402, the "Standard Merger and Acquisition Reviews Through Equal Rules Act," by the H. Comm. on the Judiciary, 113th Cong., at 150 (Sept. 10, 2014).

³⁸ *Id.*

³⁹ AMC Report at 140–41.

⁴⁰ *Id.* at 129 (recommending "no comprehensive change to the existing system in which both the FTC and the DOJ enforce the antitrust laws").

⁴¹ See AAI Letter at ¶7 (noting that reform of judicial and public vetting of merger settlements was "one aspect of institutional reform in the merger enforcement field that is now timely for Congressional consideration").

III. WITH RESPECT TO THE PRELIMINARY INJUNCTION STANDARD, H.R. 5402 ADDRESSES A NON-EXISTENT PROBLEM, BUT IN SO DOING EXPOSES ITS PROPONENTS' INTENT TO APPLY A LESS CONSUMER-FRIENDLY STANDARD.

By making the preliminary injunction standard applicable in DOJ merger cases⁴² also apply to the FTC in merger cases⁴³, H.R. 5402 does not solve a real problem. The dominant opinion among courts, academics, and the antitrust bar appears to be that the standards, while nominally different, are the same in practice.⁴⁴ Assuming there is a real difference between the injunction standards, however, attempting to unify them once again raises the concern that the bill simply seeks to undermine the FTC's independence and distinctiveness, contrary to Congress's intent in creating an independent antitrust enforcement agency in the first place.

We agree with the points raised by AAI regarding the preliminary injunction standards applicable to the FTC and the DOJ. First, AAI noted that the differences in the preliminary injunction standards did not matter "in any material sense since courts generally require both agencies to make strong showings of probably anticompetitive effect before a preliminary injunction is entered. . . ." ⁴⁵ It further argued that:

Assuming this difference does matter, however, SMARTER Act supporters prematurely jump to the conclusion that the correct solution to this "unfairness" is to subject FTC challenges to the tougher standard applicable to DOJ. Why is it not better from a public policy standpoint to address the anomaly by extending the benefit of the Section 13(b) standard to DOJ challenges? A deferential standard for both agencies is warranted by the expertise and sophistication of the merger review process at both agencies. . . .⁴⁶

Similarly, Professor Kirkwood testified that equalizing the FTC and DOJ preliminary injunction standards was not necessary because both standards function the same way as a practical matter.⁴⁷ He did, however, express the concern that changing the preliminary injunction standard applicable to the FTC in merger cases could have unintended consequences, like causing courts to apply the non-FTC standard in non-merger cases as well. He also testified that the FTC Act standard, to the extent that it really was substantively more favorable to the government than the one appli-

⁴²When DOJ seeks a preliminary injunction, it acts pursuant to section 15 of the Clayton Act, which provides, in part, that a court hearing a case under the Act "may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." 15 U.S.C. §25 (2014). Section 15, however, does not specify a standard for determining when to grant a preliminary injunction. Therefore, a modified version of the general test for preliminary injunctions applies. The test is usually articulated as requiring that the government show a reasonable likelihood of success on the merits and that the balance of equities tips in its favor. *See, e.g., U.S. v. Siemens Corp.*, 621 F.2d 499, 505 (2d Cir. 1980).

⁴³FTC Act section 13(b) requires a court to grant a preliminary injunction to the FTC upon "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. §53(b) (2014). Courts have interpreted this standard to mean that the FTC must raise questions that are "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714–15 (D.C. Cir. 2001).

⁴⁴*See, e.g., AMC Report* at 141 (noting the view of Commissioners Garza, Jacobson, and Kempf that the standard is the same and that such legislation is not truly necessary).

⁴⁵AAI Letter at ¶ 1.

⁴⁶*Id.*

⁴⁷Kirkwood Statement at 3.

cable to the DOJ, was designed to allow the FTC to use its administrative proceedings.⁴⁸

CONCLUSION

This year marks the 100th anniversary of the establishment of the FTC, an agency specifically created by Congress to strengthen the enforcement of antitrust law in order to better protect the American consumer. Congress intended the agency to be a vigorous enforcer of the law and to develop antitrust policy in a bipartisan and expert manner while being comparatively insulated from the changing political and economic priorities that occur with each new presidential administration. A hallmark of this independence, and a key tool in support of its mission and of its independent status, is the FTC's ability to pursue administrative adjudication, including in merger enforcement cases. By prohibiting the agency from exercising this authority in merger cases, H.R. 5402 ultimately strikes at the very heart of the rationale for the FTC's existence and directly contravenes Congress's intent in establishing the FTC a century ago. Whatever the potential benefits for business in terms of lowered costs and uncertainty, undermining the FTC's independence and distinctiveness jeopardizes the agency's ability to protect consumers.

We are additionally concerned that H.R. 5402 goes well beyond the recommendations of the AMC. In particular, the elimination of administrative adjudication authority would also apply to certain non-merger conduct, including joint ventures and "similar" transactions.

Finally, the bill's uniform preliminary injunction standard for merger cases appears to be a solution in search of a problem. Most observers concur that whatever differences in their articulation, such differences would not change the outcomes in any given case. Nonetheless, to the extent that there is a material difference, and to the extent that the FTC Act standard is, in fact, more favorable to enforcement authorities, as H.R. 5402's proponents contend, H.R. 5402 chooses the less consumer-protective standard.

For the foregoing reasons, we urge our colleagues to oppose H.R. 5402.

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⁴⁸*Id.* at 4–5. We further note that H.R. 5402 does not guarantee independent litigating authority for the FTC in preliminary injunction proceedings, thereby further undermining the FTC's independence.